

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
InterCall, Inc.'s Petition for Stay of the	)	WCB Docket No.: 96-45
Decision of the Universal Service	)	
Administrative Company	)	

**PETITION FOR STAY PENDING COMMISSION REVIEW**

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## SUMMARY

On February 1, 2008, InterCall, Inc. (“InterCall”) filed an appeal of an Administrator’s Decision by the Universal Service Administrative Company (“USAC”). USAC’s decision, specifically its interpretation of “toll teleconferencing,” is unprecedented; outside USAC’s authority; and is without support from Federal Communications Commission (“FCC” or “Commission”) rules, orders, or long-standing industry practices. The FCC has never regulated audio bridging services nor has it required audio bridging providers to file FCC Form 499s. Audio bridging service providers are end users of telecommunications services, not telecommunications carriers, and therefore are not required to file Form 499s or contribute directly to the universal service fund (“USF”).

InterCall will be substantially and irreparably harmed unless USAC’s order is stayed. The order singles out InterCall as the sole industry participant required to file and contribute to the USF, placing InterCall at a severe competitive disadvantage. Additionally, compliance with the order will require InterCall to modify its pricing schedules and billing operations, the cost of which InterCall will not be able to recoup if the order is overturned on appeal. Therefore, InterCall hereby respectfully requests that the Commission stay the USAC order pending review of the decision.

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InterCall, Inc. ("InterCall"), through its attorneys and pursuant to section 4(i) of the Communications Act of 1936, as Amended ("Act")<sup>1</sup> and sections 1.41, 1.43, and 54.719 of the Commission's Rules<sup>2</sup> hereby submits this petition asking the Federal Communications Commission ("FCC" or "Commission") to stay the January 15, 2008 decision of the Universal Service Administrative Company ("USAC") regarding InterCall's audio bridging services.<sup>3</sup> Because USAC directed InterCall to take action within 60 days (*i.e.*, by March 16), InterCall respectfully requests expedited consideration of this petition.

**I. INTRODUCTION**

In its decision, USAC concluded that the audio bridging services offered by InterCall are "toll teleconferencing" services and ordered InterCall to file, within 60 days, Form 499s on a prospective and retroactive basis. USAC's conclusion is unprecedented. Since the introduction of conference calling services in the early 1980s, the FCC has never regulated the service nor has it required the hundreds of providers of the service to file FCC Form 499s. To the contrary, only

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<sup>1</sup> 47 U.S.C. § 154(i).

<sup>2</sup> 47 C.F.R. §§ 1.41, 1.43, 54.719.

<sup>3</sup> Letter to Steven A. Augustino Counsel to InterCall, Inc. from USAC, Administrator's Decision on Contributor Issue, dated January 15, 2008 ("Administrator's Decision").

90 days before the Administrator's Decision, the FCC ruled that conference call providers are *end users*, not carriers.

Moreover, the Administrator's Decision would substantially and irreparably harm InterCall if it is not stayed before USAC's 60 day deadline. If InterCall, and InterCall alone, is required to submit Form 499s, competition will be distorted and InterCall will be placed at a distinct and irreparable handicap compared to the rest of the conference call industry. Even if InterCall ultimately succeeds in its appeal, USAC's 60 day deadline will substantially disrupt InterCall's operations during consideration of the appeal and force it to implement very costly changes to its cost, accounting and billing systems that cannot be recouped.

On February 1, 2008, InterCall filed an appeal of the Administrator's Decision.<sup>4</sup> Pending the FCC's consideration of InterCall's appeal, InterCall now requests that the Commission immediately stay (1) USAC's conclusion that InterCall offers "toll teleconferencing" within the meaning of the 499 Form and (2) USAC's instruction to file present and past due 499 Forms.

## **II. ARGUMENT: THE COMMISSION SHOULD STAY USAC'S ORDER PENDING COMMISSION REVIEW**

The purpose of a stay or interim relief is to maintain the status quo until the rights of the parties can be fairly and fully investigated.<sup>5</sup> The Commission considers requests for interim relief on a case-by-case basis,<sup>6</sup> and evaluates requests for stay based on the test set forth in

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<sup>4</sup> InterCall, Inc., Request for Review of Decision of Universal Service Administrator, CC Docket No. 96-45 (filed Feb. 1, 2008).

<sup>5</sup> *See Textile Unlimited, Inc. v. A.B.M.H. and Company, Inc.*, 240 F.3d 781, 786 (9th Cir. 2001) ("A preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment.").

<sup>6</sup> *See Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22571, ¶ 169 (1997).

*Virginia Petroleum Jobbers*.<sup>7</sup> Under that test, a petitioner must demonstrate: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of the injunctive relief requested; (3) that relief will cause no substantial injury to any other party; and (4) that issuance of the order will further the public interest.<sup>8</sup> In applying these factors, the Commission recognized that no single element is necessarily dispositive,<sup>9</sup> because the importance of the four criteria will vary depending on the circumstances. If a petitioner's basis for relief is not strong regarding one element of relief, the Commission may still grant relief where other elements strongly favor it.<sup>10</sup> Here, all of the elements weigh in favor of a stay.

**A. InterCall is Likely to Prevail on the Merits**

The likelihood that the petitioner will succeed on the merits is an important element in the Commission's evaluation.<sup>11</sup> In fact, a strong showing of likely success means that the petitioner "need not make a strong showing of irreparable harm."<sup>12</sup>

InterCall is likely to prevail on the merits because USAC exceeded its authority by issuing *any* decision and because, even if it had authority to issue a decision, USAC's conclusion is clearly erroneous. Audio bridging services are not telecommunications services required to

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<sup>7</sup> *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*").

<sup>8</sup> *Id.*

<sup>9</sup> *AT&T Corp. v. Ameritech*, Memorandum Opinion and Order, 13 FCC Rcd 14508 ¶ 14 (rel. June 30, 1998); *see also Washington Metropolitan Area Transit Commission v. Happy Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("we hold that under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.")

<sup>10</sup> *See Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 ¶ 2 (rel. July 21, 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Charter Communications Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 12 FCC Rcd 13890 ¶ 4 (rel. July 31, 2007) ("*Charter Communications*").

contribute to the Fund, as validated by consistent Commission precedent and industry practice. Further, USAC's application of its ruling retroactively contradicts the Enforcement Bureau's actions with respect to one of InterCall's largest competitors, who offers service in a substantially identical manner. Until the FCC determines under its permissive authority pursuant to Section 254(d) that it is in the public interest for audio bridging services to contribute to the Fund, audio bridging providers are not required to file 499s.

### **1. USAC Exceeded Its Authority in Issuing the Decision**

Section 254 of the Act identifies Congress's principles regarding universal service and directs the Commission to implement those principles.<sup>13</sup> The Commission has recognized that it alone is authorized to establish the policies governing the universal service program and that it may delegate to USAC only limited authority to conduct the administrative functions necessary to administer the program. As the Commission noted in a 1998 Report and Order revising the organizational structure of the universal service fund administrator, the entity chosen to administer the fund "may not administer the programs in any manner that requires the entity to interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission."<sup>14</sup>

The Commission further clarified USAC's role in administering the USF program as follows:

Consistent with Congress's directive that the combined entity shall not interpret rules or statute, we emphasize that USAC's function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the

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<sup>13</sup> 47 U.S.C. § 254 *et seq.*

<sup>14</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶15 (1998).

statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed.<sup>15</sup>

Under the Commission's rules, USAC "cannot make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."<sup>16</sup> Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator "*shall* seek guidance from the Commission."<sup>17</sup>

The instant case presented precisely the scenario envisioned by section 54.702(c). As discussed more fully in InterCall's appeal, USAC faced more than an administrative question. The Commission has never classified audio bridging services as telecommunications services, audio bridging providers have not been subjected to common carrier regulations and the standard practice for the audio bridging industry has been to purchase telecommunications inputs as end users. FCC Rule 54.706 lists 19 separate services or service providers subject to USF contribution obligations but omits audio bridging, conferencing or similar services.<sup>18</sup> InterCall also showed that revisions to the FCC Form 499-A Instructions made in 2002 were ambiguous, and that interpretation of them in a manner that requires audio bridging providers to file Form 499s would conflict with long-standing FCC precedent and industry practice. Accordingly, under the circumstances, USAC was *required* to seek Commission guidance concerning the proper filing and contribution requirements.

USAC exceeded its authority in two ways. First, USAC took it upon itself to supplement the obvious omission of conferencing services from Commission rule 54.706. In its

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<sup>15</sup> *Id.* ¶ 17.

<sup>16</sup> 47 C.F.R. § 54.702(c).

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> 47 C.F.R. § 54.706.



Administrator's Decision, USAC concluded that "[b]ecause the list in the regulation is meant to provide examples and not be inclusive . . . the list itself does not provide toll teleconferencing operators with an exemption from USF reporting and contribution requirements."<sup>19</sup> Here USAC exercises impermissible discretion to read new services into a Commission rule, in effect opining on what the Commission's policy should be.

Second, USAC chose to arbitrarily and capriciously ignore substantial evidence that the scope and use of the term "toll teleconferencing" in its forms is ambiguous and must be interpreted in light of decades of Commission precedent and practice in treating audio bridging providers as end users. Instead of considering potential ways to interpret the use of "toll teleconferencing" consistent with this evidence, USAC erroneously chose to apply the term mechanically to expand the Commission's list of mandatory filers:

Since 2002, the Form 499-A instructions have specifically stated: "Line 314 and Line 417 should include toll teleconferencing." This language is clear and does not give USAC discretion to exclude these services from USF contribution requirements.<sup>20</sup>

USAC could declare the language "clear" only by ignoring other evidence InterCall provided, including the FCC's conclusion in *Qwest v. Farmers* that conference call providers are end users and the Enforcement Bureau's investigation of a competitor. USAC avoided section 54.702(c) by acting as if this other evidence did not exist.

In both of these instances, USAC committed error. USAC was *required* to seek Commission guidance on how to administer an uncertain Commission policy. Instead, USAC chose, in one instance to assert discretion to supplement a Commission list of contributing services and in the other disavowed any discretion to read language in context, thereby making

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<sup>19</sup> Administrator's Decision at 2.

<sup>20</sup> Administrator's Decision at 2.

another determination – that the Form 499 did not permit an exemption. Consequently, USAC’s decision went beyond USAC’s authority and usurped the FCC’s policy making authority. The decision was an *ultra vires* act and should be stayed pending review of the merits.

**2. Even if USAC Had Authority to Render a Decision, its Conclusion is Erroneous**

**a. The 499 Form Does Not Have the Effect of a Statute or Rule and Cannot by Itself Require Contributions**

USAC’s only basis for concluding that audio bridging services must contribute to the Fund as carriers was a 2002 revision to the Form 499-A Instructions. But, as explained further in the appeal, this addition to the Instructions did not obligate audio bridging providers to contribute to the Fund. First, the 2002 Instructions did not provide a definition of “toll teleconferencing,” thus USAC could not interpret the modification without Commission guidance. Second, it was the Common Carrier Bureau (“CCB”) that modified the Instructions, and it would have been beyond the Bureau’s delegated authority to change policy to add audio bridging services to the list of contributors. Therefore, USAC’s reliance on this revision was misguided.

The Commission delegated to the CCB authority only to make *administrative* changes to USF, TRS, LNP, and NANP reporting requirements.<sup>21</sup> The Commission did not delegate authority to make policy decisions as to which carriers must contribute to the Fund.

These delegations extend to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed,

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<sup>21</sup> 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Report and Order, 14 FCC Rcd 16602, 16621 (1999).

incorporating edits to reflect *Commission changes* to the substance of the mechanisms, and other similar details.<sup>22</sup>

In fact, CCB acknowledged, although somewhat cryptically, that it did not intend to make substantive changes to the program. The Bureau stated it revised the worksheet based on Commission actions and court decisions while making editorial clarifications. The Bureau's cited authority was a slamming order revising FCC form 499-A to include registration information and the language cited above regarding administrative changes.<sup>23</sup> It follows that the Bureau acknowledged that it could not make any policy changes.

Moreover, no Commission order or rules obligate any stand alone conference call provider to contribute to the Fund. Nowhere in the FCC's Universal Service orders does the Commission extend USF reporting requirements to audio bridging or any other type of stand alone conferencing service. In fact, only 90 days before the Administrator's Decision, the Commission ruled that conference call providers are end users, not carriers, under LEC access tariffs.<sup>24</sup> In that case, the Commission found: "[t]he record indicates . . . that the conference calling companies are end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with the tariff."<sup>25</sup> USAC's interpretation of CCB's 2002 modification appears to reclassify conference call providers as carriers, which is an interpretation that would take the Bureau's action beyond an "editorial clarification" into the

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<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) For April 1, 2002 Filing by All Telecommunications Carriers*, DA 02-529 (rel. Mar. 4, 2002) ("2002 Form 499 Public Notice").

<sup>24</sup> *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone*, 22 FCC Rcd 17973 (2007) *modified on recon.*, FCC 08-29 (rel. Jan. 29, 2008). The further factual investigation initiated in the Order on Reconsideration does not affect the legal conclusion that audio bridge providers are end users when they subscribe to service. *See Order on Reconsideration*, FCC 08-29, ¶ 7.

<sup>25</sup> *Id.* ¶35.

realm of substantive policy change. But as we have pointed out, such a policy change is beyond the Bureau's delegated authority.

**b. The Industry Practice, Approved by the Commission, is that Audio Bridging Service Providers Are Not Subject to USF Reporting and Direct Contribution Obligations**

InterCall also is likely to prevail because USAC's decision upends 25 years of consistent industry practice and Commission precedent. The standard practice within the audio conferencing industry is that audio bridging providers are not subject to USF reporting and contribution obligations. InterCall competes with dozens of other audio bridging providers, the vast majority of which are stand alone conferencing providers, *i.e.*, they purchase transmission lines from telecommunications carriers. As discussed more fully in InterCall's appeal, none of these entities file 499-As or contribute directly to the USF. Instead, the standard practice is for stand alone providers to contribute indirectly as end users of toll-free telecommunications services.

The Commission has knowingly approved this practice. In 2004 and 2005, the Enforcement Bureau opened two investigations into Communications Network Enhancement, Inc. ("CNE"), a subsidiary of Premiere Global Services, Inc., and a competitor of InterCall. CNE's description of its services is typical of the conference calling industry, and substantially identical to InterCall's. Neither InterCall nor CNE owns its own transmission facilities and neither offers transmission services to its customers. Instead, they purchase transmission services from a telecommunications carrier as end users and contribute to the Fund by paying end user USF surcharges assessed by their carriers.

In 2004 and 2005, the Enforcement Bureau intended to determine whether CNE should file Form 499-A. As shown by documents obtained by InterCall through a FOIA request, when CNE contacted the FCC to discuss CNE's USF obligations, it was told by a staff member to

contact the National Exchange Carrier Association (“NECA”), which in turn told CNE to contact USAC directly. USAC’s Data Collection Group referred CNE back to NECA’s Associate Manager of Revenue Administration. In an email, dated June 16, 2004, the NECA official informed CNE that:

Based upon your description below [that] “CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges” and because MCI carries the call, MCI bills you as their end user and you only provide the hardware for the conference call to take place, *you are not required to file the 499-A form.* (emphasis added).

CNE forwarded this advice to the Bureau staff which were handling two proceedings into CNE’s contribution requirements. The Bureau closed both investigations without an order.

The Enforcement Bureau’s actions are relevant for two reasons. First, they provide a contemporaneous interpretation of the Act and the rules showing that filing obligations do not apply to audio conferencing services provided by entities like InterCall. Second, they validate InterCall’s contention that the 2002 revision to FCC Form 499-A does not (and as explained above could not) require stand alone audio conferencing providers to contribute to the Fund as carriers. The fact that the Enforcement Bureau closed the investigations in 2004 and 2005 belies the contention that the 2002 revision is controlling.

A petitioner requesting a stay need not show certainty of success, but merely a likelihood of success. InterCall is confident that the information supplied above supports its position that audio bridging services are not required to file Form 499-A and contribute directly to the Fund. In order to grant a stay, the Commission need not (and should not) resolve the underlying questions on appeal, but the discussion above clearly demonstrates that InterCall is on firm ground, and warrants a stay pending the Commission’s review of the issue.

**B. The Balance of Harm is in Favor of Granting InterCall's Petition**

In addition to a likelihood of success on the merits, the remaining three factors in *Virginia Petroleum Jobbers* weigh in favor of a stay. As shown below, InterCall is likely to suffer irreparable harm absent a grant of injunctive relief, no other party is harmed by a stay and, under the circumstances, issuance of a stay furthers the public interest. Collectively, these three factors demonstrate that the balance of harms favors grant of a stay.

The Administrator's Decision created a unique situation, in which a lone industry participant has been singled out to comply with USF obligations. To comply with USAC's order on a retroactive basis, InterCall faces the likelihood of a significant and unrecoverable double payment of USF. To comply with USAC's order on a prospective basis, InterCall will have to substantially modify its operations within the next two months to ensure ongoing compliance, modifications that will be wasted if it prevails on appeal. As described below, InterCall will be forced to increase its rates to recover its USF contribution obligations from its customers – something that no other industry participant must do. While InterCall raises its rates and devotes significant time, energy, and resources to comply with USAC's order, its competitors will operate according to the *status quo*. Under the peril of being the sole industry player subject to burdensome regulatory requirements, imposed under questionable circumstances, the balance of harm tips sharply in InterCall's favor.

To sufficiently demonstrate irreparable harm, a petitioner must demonstrate that the harm is certain and great, actual and not theoretical.<sup>26</sup> Although it is generally understood that mere

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<sup>26</sup> *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). See also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 11754, ¶ 8.

economic loss is not irreparable,<sup>27</sup> the threat of unrecoverable economic loss does qualify as irreparable harm.<sup>28</sup> And where it is likely for a petitioner to lose customers, the balance of harms tips in favor of the petition.<sup>29</sup>

The Administrator's Decision puts InterCall in a difficult position. Implementation of the Decision will substantially increase InterCall's costs by obligating it to contribute approximately 11% of telecommunications revenues that are within the meaning of the USAC order. As stated in the declaration of Michael J. Nessler, attached to this petition, InterCall could not absorb such an increase in its costs without also increasing its end user rates.<sup>30</sup> Thus, if the USAC decision is applied, InterCall would be forced to pass its USF contributions on to subscribers as a line-item surcharge. The subsequent price increase would jeopardize InterCall's competitiveness in the market and cause it to lose customers.<sup>31</sup> InterCall would then be faced with a severe economic disadvantage as the only competitor in the industry subject to this requirement. In the audio conferencing market, there are few, if any, restraints to keep customers from switching service providers. InterCall's loss is actual and not theoretical; a 10-11% increase in fees will undoubtedly result in the loss of customers. Meanwhile, because none of its stand alone competitors are required to contribute directly to the Fund, InterCall's loss is likely unrecoverable. Its competitors will enjoy a cost advantage that will enable them to capture

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<sup>27</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 11754 ¶ 8 (1996).

<sup>28</sup> *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("*Multi-Channel TV Cable Co.*"); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

<sup>29</sup> *See AT&T Corp., et al., v. Ameritech Corporation*, 13 FCC Rcd 14508, 14521, ¶ 27 (1997).

<sup>30</sup> Declaration of Michael J. Nessler, Executive Vice President of Global Operations, InterCall, Inc., at ¶ 4 (attached hereto as Exhibit 1) ("Nessler Dec.").

<sup>31</sup> Nessler Dec. at ¶ 4.

customers and market share, while painting InterCall as a less desirable competitive option, thereby harming its reputation.

In addition to the cost of payments to USAC, InterCall faces significant costs of compliance as a result of filing Form 499s. For example, InterCall will be forced to devote a large supply of money, time, and resources to systems modifications to comply with the Administrator's Decision. InterCall will have to identify all services subject to the USAC decision, and in many instances will have to separate a toll teleconferencing portion of a bundled service offered today.<sup>32</sup> Because InterCall has not had to conduct such an analysis before, it will incur significant one-time costs in establishing the required methodologies. This will require significant changes to its systems to segregate revenues subject to USF reporting purposes and require InterCall to develop new processes for analyzing services.<sup>33</sup> InterCall also would have to train personnel how to conduct these reviews, and incorporate this training into ongoing processes, so that new services or packages can be analyzed as well.<sup>34</sup>

Additionally, in order to pass USF charges on to its customers, InterCall will be required to make several significant changes to its billing systems. First, InterCall would have to modify its systems used for generating rate quotes and responses to RFPs to recognize revenues subject to USF reporting and to incorporate USF surcharges InterCall would assess.<sup>35</sup> Second, InterCall would have to implement changes to its billing and accounting systems to invoice this USF surcharge to its customers.<sup>36</sup> InterCall's billing and accounting systems are customized software products, which cannot easily be modified. Currently, InterCall has approximately 1000

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<sup>32</sup> Nessler Dec. at ¶ 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Nessler Dec. at ¶ 6.

<sup>36</sup> Nessler Dec. at ¶ 7.



individual changes in the development queue. Any change necessary to implement the USAC decision would have to be implemented on a priority basis, and would result in delays to many of the pending changes in queue.<sup>37</sup>

Moreover, InterCall has purchased several conference call providers over the years. As a result, it has legacy systems for many functions described above. Many of the activities described would have to be implemented across multiple systems simultaneously, adding complexity and cost to the process.<sup>38</sup>

Finally, there will be no harm to the USF fund in the interim. USAC acknowledges that InterCall likely already is contributing indirectly to the USF and thus the Administrator's Decision could result in double contributions to the USF. Such double payment is a harm to InterCall weighing in favor of relief. At the same time, the avoidance of double payments is hardly a "harm" to USAC or the Fund in the event a stay is granted. If a stay is granted, the USF fund will operate as it heretofore has operated – with stand alone providers paying substantial amounts to support USF indirectly, through their carrier suppliers.

USAC offers only an unrealistic and unsatisfactory resolution to avoid double payments. USAC contends in the Administrator's Decision that even if InterCall is "buying lines from a carrier where the carrier has already contributed to the USF for such lines, InterCall may not claim an exemption from filing the required forms and contributing to USF" absent a specific exemption.<sup>39</sup> USAC also recognizes the "potential issue of double billing of USF charges" that can result from providers such as InterCall being required to contribute directly to the USF

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Administrator's Decision at 2.

despite already making indirect contributions on those same services.<sup>40</sup> USAC's suggestion that InterCall seek reimbursement from its underlying carriers for any double USF contributions is both naïve and unlikely to succeed.

Putting aside the difficulty of stopping end user surcharges from InterCall's vendors, attempting to recover its prior indirect USF contributions from InterCall's underlying telecommunications carrier would be time consuming, expensive and unlikely to succeed. It is unlikely that InterCall's telecommunications carriers voluntarily would refund USF charges paid by InterCall. In order to recoup its prior, indirect USF contributions, InterCall likely would have to sue its telecommunications carriers, thereby expending time and effort and incurring additional debt with no guarantee of prevailing. This problem is further compounded by USAC's direction that InterCall file Form 499s on a retroactive basis. Such filings surely would result in InterCall being assessed USF contributions for previous years that it has already paid indirectly. It is unrealistic to believe that InterCall's underlying telecommunications carriers would be willing to reimburse InterCall for USF charges paid possibly several years prior.<sup>41</sup> Requiring InterCall to file Form 499s, and potentially make direct USF contributions, will result in it having to make duplicative USF contributions with little or no hope of recovering those payments.

The above costs are "unrecoverable", and thus irreparable under Commission precedent.<sup>42</sup> If the Commission eventually overturns the Administrator's Decision, InterCall will have spent its time and money in an unnecessary attempt to comply with an *ultra vires* order that

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<sup>40</sup> Administrator's Decision at 2.

<sup>41</sup> Among other considerations, InterCall's telecommunications carriers would not be able to revise their own 499s filings to "back out" revenues from InterCall, given USAC's one year limitation of downward revisions to 499s. See <http://www.usac.org/fund-administration/contributors/revenue-reporting/revising-revenue-worksheets.aspx>.

<sup>42</sup> *Multi-Channel TV Cable Co.*, at 552.

was not based on the Commission's rules or orders. Complying with USAC's order, in light of the likelihood that InterCall will prevail in its appeal, would be a waste of time and energy for InterCall and USAC, which would have to review InterCall's filings. The cost of this wasted time and energy will ultimately be borne by consumers. Clearly, that is not in the public interest.<sup>43</sup>

Finally, the public interest is promoted by a grant of a stay. A stay would preserve the status quo within the industry since InterCall entered this market. A stay would allow InterCall to compete with the rest of the audio conferencing industry on equal footing. Further, a stay would promote the Commission's goal of competitive neutrality. The Administrator's Decision applies solely to InterCall and does not create an obligation on other audio bridging providers to contribute to the Fund. Thus, InterCall has been singled out as the only company in its industry that must file Form 499 and contribute as a carrier. If the Commission wishes to extend filing and contribution obligations to InterCall it should do so to the entire audio bridging industry and not target one company.

### **III. CONCLUSION**

The Administrator's Decision creates a unique situation. USAC acted without seeking guidance from the Commission and without any Commission rule or precedent on which to base its decision. Audio bridging services are a previously unclassified and unregulated service that the Commission has not addressed. InterCall was not, and is not, a telecommunications carrier. Rather, InterCall operates in an industry that collectively views itself as an unregulated service,

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<sup>43</sup> See *Charter Communications*, ¶ 9 ("In light of our finding that Charter will likely prevail on the ultimate issue of effective competition, continued rate regulation by the City, followed by Charter's attempt to recoup its losses, would waste the time and energy of both the City and Charter. The cost of such waste would ultimately be borne by the City's taxpayers and Charter's subscribers. The public interest counsels against such waste.").

not subject to reporting and contribution obligations under the Commission's USF rules. USAC imposed obligations on a previously unclassified and unregulated service provider that would require significant amounts of operational modifications to comply, all prior to InterCall ever obtaining review of the decision. The USAC decision did not address the audio conferencing industry, but InterCall alone. While InterCall diligently works to comply with the order, its competitors will continue to provide service according to the status quo.

For the foregoing reasons, InterCall respectfully requests the Commission to stay the Administrator's Decision pending a full review of the issue.

Respectfully submitted,

INTERCALL, INC.

By: 

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Its Attorneys

February 5, 2008

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
InterCall, Inc.'s Petition for Stay of the	)	WCB Docket No.: 96-45
Decision of the Universal Service	)	
Administrative Company	)	

**DECLARATION OF MICHAEL J. NESSLER**

My name is Michael J. Nessler and I am over eighteen years old. I am the Executive Vice President of Global Operations for InterCall, Inc. ("InterCall"). InterCall is a corporation organized and existing under the laws of Delaware, with its principal office located at 11808 Miracle Hills Drive, Omaha, NE 68154 and on whose behalf I make this Declaration. I provide this Declaration in compliance with the requirements of Section 1.16 of the Federal Communications Commission's (the "Commission") rules, 47 C.F.R. § 1.16.

Under penalty of perjury, I hereby declare that the following is true and correct to the best of my knowledge and belief:

1. I am employed by InterCall as an Executive Vice President of Global Operations. As such I have extensive knowledge of InterCall's billing practices. Also, I have personal knowledge of the industry in general as well as competition and pricing specifically.
2. The conference calling industry, specifically the market for stand alone conference calling services, is highly competitive and customers make product determinations based on small price differentials between service providers.
3. Currently, stand alone providers of audio bridging services do not contribute directly to the universal service fund ("USF"). Therefore, neither InterCall nor its stand alone competitors charge USF line-item surcharges on their end user invoices. If the January 15, 2008 USAC decision is applied, InterCall will be required to contribute directly to the USF for the first time. I understand that the USF is approximately 11% of its end user telecommunications revenues subject to the fund. As a result, InterCall would be required to contribute an amount equal to approximately 11% of the revenues that are determined to be "telecommunications" revenues as a result of the USAC decision.
4. InterCall could not absorb such an increase in its costs without also increasing its end user rates. Thus, if the USAC decision is applied, InterCall would be forced to pass its USF contributions on to subscribers as a line-item surcharge. This will require an increase in InterCall's pricing and jeopardize InterCall's competitiveness in the market. I expect that many of InterCall's competitors – who are not subject to the same USF contribution obligation – would be able to capitalize on an InterCall rate increase to take customers from our services.

5. Compliance with the USAC order also would impose significant internal and third party vendor costs on InterCall. In order to comply with the order to file FCC Form 499s, InterCall will have to modify its billing and accounting systems to identify revenues subject to the Administrator's Decision. InterCall has never conducted this analysis before, and it has recently established a team to undertake this task. In order to comply, the team first will have to identify all services subject to the USAC decision. This will require InterCall to determine which services involve "toll teleconferencing" services as defined by USAC and to identify the amount of telecommunications revenue derived from those services. In many instances, our services are offered as package of features and services available to the customer. We typically do not separate a toll teleconferencing portion of these services today. In order to comply with the USAC decision, InterCall would have to develop a methodology to identify the toll teleconferencing portion of these services. This will require significant changes to its systems to segregate revenues subject to USF reporting purposes and require InterCall to develop new processes for analyzing services. We also would have to train personnel how to conduct these reviews, and incorporate this training into ongoing processes, so that new services or packages can be analyzed as well.

6. Additionally, in order to pass USF charges on to its customers, InterCall will be required to make several significant changes to its billing systems. First, InterCall would have to modify its systems used for generating rate quotes and responses to RFPs to recognize revenues subject to USF reporting and to incorporate USF surcharges InterCall would assess. In many instances, InterCall would have to modify previously submitted proposals that did not incorporate such USF surcharges. With respect to current contracts, InterCall would have to determine whether it has the ability to surcharge for USF obligations under the existing contract. In many cases, InterCall may not be able to include such a surcharge without modification of the contract.

7. Second, InterCall would have to implement changes to its billing and accounting systems to invoice this USF surcharge to its customers. InterCall's billing and accounting systems are customized software products, which cannot easily be modified. Currently, we have approximately 1000 individual changes in the development queue. Any change necessary to implement the USAC decision would have to be implemented on a priority basis, and would result in delays to many of the pending changes in queue. Delays in these changes could harm InterCall, as many of the pending changes are being implemented at a specific customer's request. If InterCall is unable to deliver on its previous promises to its customers, it could suffer irreparable harm to its reputation.

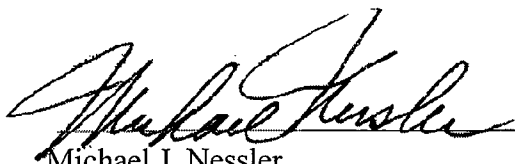
8. InterCall has only recently begun to analyze the changes that would be necessary to implement an end user surcharge for USF contributions. InterCall's billing system is a customized software product, which cannot easily be modified. Based on our preliminary analysis, it will take between 9-12 months to implement changes of this magnitude with InterCall's internal personnel, not the 60 days that the USAC order allows. Moreover, our preliminary estimates indicate that these changes will cost \$3.2 to \$3.8 million at a minimum. Costs could be 50% higher if additional personnel are necessary to meet the project's requirements or deadlines.

9. Moreover, InterCall has purchased several conference call providers over the years. As a result, it has legacy systems for many functions described above. Many of the activities

described would have to be implemented across multiple systems simultaneously, adding complexity and cost to the process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On: 2/5/08

A handwritten signature in black ink, appearing to read "Michael J. Nessler", written over a horizontal line.

Michael J. Nessler  
Executive VP, Global Operations  
InterCall, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>th</sup> day of February, 2008, I served a copy of the foregoing "Petition for Stay Pending Commission Review" on the following parties by the methods indicated below.

Marlene H. Dortch, Secretary\*  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

David Capozzi, Esquire  
Universal Service Administration Company^  
2000 L Street, NW  
Suite 200  
Washington, DC 20036

  
Tara Mahoney

\*via ECFS

^via first class mail